Supreme Court, U.S.
FILED

97 769 NOV - 3 1997

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

LOUDOUN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a school district has an obligation under IDEA to offer educational services to a disabled student once the student moves to another jurisdiction and receives a free appropriate public education there.

2. Whether a student's move to another jurisdiction moots the issue of the appropriateness of the student's IEP which was proposed prior to his relocation.

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No.

IN THE
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross-Petitioner, Loudoun County Board of Education, respectfully requests that this Court grant this Conditional Cross-Petition in the event it grants the Petition

for Writ of Certiorari submitted by the Respondents in this case.

OPINIONS BELOW

The Opinion and Order of the court of appeals reversing the district court and remanding the case for dismissal is reported at 118 F.3d 996 (4th Cir. 1997) A-1.[1] The Order (A-18), the Memorandum Opinion (A-20) and the Supplemental Opinion (A-39) of the district court are not officially reported. However the Memorandum Opinion of the district court is unofficially reported at 24 Individuals with Disabilities Education Law Report (IDELR) 1171. The state administrative decision (A-41) is unofficially reported at 22 IDELR 833. The decision of the administrative due process hearing (A-47) is unofficially reported at 21 IDELR 1089. Additional decisions relevant to this cross-petition include the decision of the district court denying the Motion to Dismiss dated March 1, 1996, which is not a reported decision. CA-1.[2]

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[1] References to the Appendix in the Petition filed by the Hartmanns will be designated "A" followed by the page number; thusly "A-1."

[2] References to the Appendix set forth in the cross-petition will be designated as "CA" followed by a page number.

JURISDICTION

The Order of the Court of Appeals was entered on July 8, 1997. The petition of the Hartmanns was filed with this court on October 1, 1997 and placed on the docket on October 3, 1997. The brief in opposition was originally due on November 2, 1997, a Sunday. November 3, 1997 is the next day not a weekend or holiday. This Conditional Cross-Petition is filed in express reliance on Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1414.[3] Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall --

---

[3] The citations to the Individuals with Disabilities Education Act are to the version in effect during the course of these proceedings and not to the reauthorized version of IDEA which became effective June 4, 1997.

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which --

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

.....

20 U.S.C. § 1415. Procedural Safeguards

(b)(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

.....

(e) Civil action; jurisdiction

.....

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. § 300.220. Child identification.

Each application must include procedures that ensure that all children residing within the jurisdiction of the LEA who have disabilities, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated, including a practical method for determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

8 VAC 20-80-50. Identification, evaluation, and eligibility.

A. Target ages and eligibility. Each annual special education plan/report and funding application shall include procedures which ensure that all children residing within the jurisdiction of an LEA, birth to age 21, inclusive, who may have disabilities, and who may need special education and related services are identified, located and evaluated. The plan also shall include a practical method for determining children who are receiving needed special education and related services and those who are not receiving such services.

.....

C. Screening.

1. Each local school division shall establish and maintain screening procedures to assure the identification of children with disabilities residing within its jurisdiction and requiring special education. All procedural safeguards shall be maintained during the screening process. These include the following:

a. Written notice when appropriate;

b. Confidentiality; and

c. Maintenance of student's scholastic record.

.....

8 VAC 20-80-60. Service delivery.

A. Free appropriate public education.

1. Age of eligibility. A free appropriate public education shall be available to all children with disabilities, ages two to 21, inclusive, residing within the jurisdiction of each LEA. Each LEA shall have established the goal of providing a full educational opportunity for all children with disabilities from birth to 21, inclusive, residing within their jurisdiction.

STATEMENT OF THE CASE

The U.S. Court of Appeals for the Fourth Circuit, on July 8, 1997, ruled in favor of the Loudoun County Board of Education ("Loudoun"), reinstated the decisions of the administrative hearing officers and reversed the district court's decision of November 27, 1997, as being contrary to the law. That decision denied one ground for reversal raised by Loudoun, namely that the case was moot due to Mark Hartmann's ("Mark") move from Loudoun County, which denial is the subject of this conditional cross-petition.

This case originated with administrative proceedings brought under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") at the request of Loudoun on June 24, 1994. Loudoun requested a due process hearing to gain permission to implement an individualized education plan ("IEP") developed on May 31, 1994, for an autistic student named Mark Hartmann. A-5. The proposed

IEP provided for a combined placement in regular education and special education classes at a regular elementary school. Id. Mark's parents refused to give consent for his academic instruction to take place in a special education classroom. Id.

Five days of administrative hearings, which included the testimony of eighteen witnesses, were held from August 15, 1994 through October 27, 1994, under 20 U.S.C. § 1415(b)(2). The local hearing officer ruled on December 21, 1994, that Loudoun's proposed IEP offered Mark a free appropriate public education and ordered its implementation. A-47. Immediately following this decision, Mrs. Hartmann moved with Mark to Montgomery County, Virginia, and enrolled him in the public school system there. A-6. The Hartmanns have sought no educational services for Mark from Loudoun since that time. CA-7. His education has been provided free of charge in Montgomery County, Virginia. Id. The last IEP proposed for Mark by Loudoun was the May 31, 1994 IEP developed prior to Mark's removal. All subsequent IEPs have been developed and implemented by the Montgomery County Public Schools. Id.

The Hartmanns appealed the adverse decision of the local hearing officer to the state level. The state review officer on May 3, 1995, affirmed the decision of the local hearing officer, again finding that Loudoun's proposed IEP was appropriate. A-6. The state review officer declined, however, on May 31, 1994, to find that the move of Mark to Montgomery County ended the obligation of Loudoun to provide services to Mark. A-42 .

The Hartmanns filed an appeal to federal district court pursuant to 20 U.S.C. § 1415(e)(3) on December 6, 1995. The district court granted a motion to dismiss Dr. Edgar B Hatrick, Superintendent, and Ned Waterhouse, Director of Pupil Personnel Services as defendants.[4] CA-1. The district court denied Loudoun's motion to dismiss the case as moot due to Mark's relocation to Montgomery County, Virginia. Id.

The district court received some additional evidence on September 8 and 9, 1996. Loudoun objected to the additional evidence relating to Mark's program after his move from Loudoun. A-21. The district court ruled on November 27, 1996, and by supplemental opinion dated December 16, 1996, that the administrative proceedings should be reversed and that a placement in regular education should be developed in anticipation of Mark's return to the Loudoun County Public Schools[5]. A-6.

On July 8, 1997, the Fourth Circuit ruled in favor of Loudoun finding that the district court's decision was contrary to law. The decision held that, contrary to the dictates of Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982), the district court impermissibly substituted

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[4]No appeal of the decision to dismiss defendants Hatrick and Waterhouse was made.

[5]As represented to the Fourth Circuit, Mark's parents did not seek his return to Loudoun prior to the Fall of 1997. As of this date, Mark still has not sought readmission to Loudoun.

its notion of educational policies for those of the school authorities (A-8), that the court impermissibly ordered an ideal education by "re-writ[ing] state teaching certification requirements in the guise of applying the IDEA" (A-14), and did not give due deference to the administrative proceedings (A-17). The Court of Appeals declined, however, to find that the case did not present a live controversy due to Mark's move to Montgomery County, Virginia and receipt of a free appropriate public education there. A-6.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

One of the primary responsibilities for school districts under the IDEA is the development of an individualized education plan which provides a free appropriate public education to a disabled student. The ruling by the court of appeals in this case, however, greatly expands the responsibility and accountability for IEP development. The decision requires school districts to continue in litigation over whether an IEP is appropriate even after the disabled student has moved from the jurisdiction of the school district several years earlier, enrolled in another public school system, and received a free appropriate public education in the new school district. This decision was rendered even though the IEP in dispute had long since expired and even though there was no claim for reimbursement. The decision is also contrary to the provisions of the IDEA which limit responsibility of the school district to providing services to students who reside within the jurisdiction of the school district. The Fourth Circuit's ruling that, under these circumstances, there is

still a live controversy, greatly expands the responsibility of school districts under the IDEA and continues needless litigation. This decision about the viability of a controversy over a proposed IEP once the student has moved from the jurisdiction presents an important question of federal law which needs to be settled by this Court.

ARGUMENT

A. Mark Is Not Entitled to a Free Appropriate Public Education In Loudoun Because He Is Not a Resident of Loudoun County.

Mark last attended the Loudoun County Public Schools on December 21, 1994. CA-6. Mrs. Hartmann moved to Montgomery County, Virginia in January 1995, established residency and enrolled Mark in the Montgomery County Public Schools in March 1995. CA-7. The Montgomery County Public Schools considers Mark to be a resident there and entitled to services under the IDEA. Id.

Mark has been attending the Montgomery County Public Schools since March 1995. Id. The Hartmanns have not sought to re-enroll Mark in the Loudoun County Public Schools since December 1994. Id. No IEP has been proposed for Mark by Loudoun since May 1994 because no educational services have been sought by the Hartmanns. The program Mark receives in Montgomery County is free and, according to his parents, offered him an appropriate public education. Id. Montgomery County receives state and federal funds to educate Mark. Id.

Mark's entitlement to educational services from the Loudoun County Public Schools ended with his change of residence because the obligation to provide a free appropriate public education under IDEA is dependent upon his residence within the Loudoun County Public Schools.

The IDEA requires local school divisions to provide a free appropriate public education only to students with disabilities who reside within their jurisdiction. This intent is expressed within the federal statute itself which requires the local school division to give assurance that it will provide programs for disabled students "residing within the jurisdiction of the local educational agency." 20 U.S.C. § 1414(a); see also 34 C.F.R. § 300.220.

Similarly, Virginia's State Regulations Governing Special Education Programs for Children With Disabilities also provide that a local school division's obligation to offer a free appropriate public education to a student with disabilities is limited to students residing within the jurisdiction of the school division. See 8 VAC 20-80-50(A) ("Each Annual Special Education Plan/Report and Funding Application shall include procedures which ensure that all children residing within the jurisdiction of an LEA, birth to age 21, inclusive, who may have disabilities, and who may need special education and related services are identified, located and evaluated.") (emphasis added).

The State Regulations later provide that "[e]ach local school division shall establish and maintain screening procedures to assure the identification of children with

disabilities residing within its jurisdiction and requiring special education." 8 VAC 20-80-50(C)(1) (emphasis added). The regulations further limit the provision of a free appropriate public education "to all children with disabilities, ages 2 to 21, inclusive, residing within the jurisdiction of each LEA. 8 VAC 20-80-60(A)(1) (emphasis added). These many limitations based on residency contained in the state and federal regulations and federal statute make it clear that a school district's responsibility under IDEA to educate students with disabilities is limited to those students who reside within its jurisdiction. Mark does not reside within Loudoun for school purposes and has not for about three years.

Mark is only entitled to a free appropriate public education from the jurisdiction within which he resides. Mark was not entitled to further services from Loudoun following his move to Montgomery County. Mark was no longer entitled to a free appropriate public education from Loudoun. The Fourth Circuit erred in not reversing on this basis.

B. No Educational Services Have Been Sought from Loudoun Since December 1994 and Any Review of the 1994 IEP Would Be Advisory.

It was stipulated that Mark's last day of enrollment in Loudoun was December 1994 and that Mark's parents believed he received a free appropriate public education in Montgomery County, Virginia, in the public schools since that time. It was uncontroverted that Mark had not sought educational services from Loudoun since December 1994.

Under these circumstances any decision that is rendered about the appropriateness of the May 31, 1994, IEP would be advisory in nature.

The Fourth Circuit previously addressed the issue of reviewing subsequent years' IEPs without requiring reexhaustion. See DeVries v. Spillane, 853 F.2d 264, 268 (4th Cir. 1988). Unlike the DeVries case, however, this case does not present a situation where, during the passage of time and the intervening years while the case was pending, new IEPs were sought from or proposed by the school district. New IEPs have not been proposed for Mark because his parents were not seeking services from Loudoun any longer.

The Eight Circuit has made a similar ruling. In Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982), the Eighth Circuit Court of Appeals determined that the EHA (now IDEA) issues presented by Monahan on behalf of his 18 year old daughter who had married and moved out of the district were moot even in light of her future plans to return to the district. Monahan at 1168. The court explained that "[w]hether it will ever happen is speculative, and therefore the issues . . . are not yet ripe for adjudication." Id.

Nor is this a situation where the case is capable of repetition yet evading review. See Honig v. Doe, 484 U.S. 305, 318 (1988). If a student is no longer entitled to services, the case is moot. Id. In Honig, defendant John Doe's claims were ruled moot because at age 24 he was no longer entitled to educational services under the EHA, now IDEA. Honig at 318. Mark's case is moot because he was no longer eligible for services from Loudoun due to his change

in residence. If there is a subsequent re-enrollment, a new IEP will be proposed at that time.

Mark is receiving a free public education which the Hartmanns have approved in another school district in Virginia. Therefore, there is no continuing disagreement between the Hartmanns and the School Board. If Mark were to return to Loudoun, a new IEP would have to be proposed for him at that time. The earlier IEP from May 1994 is no longer appropriate for review. Where an appeal has become moot due to the passage of time without fault on the part of Loudoun, the court should dismiss the case. See, Dennin v. CIAC, 94 F. 3d 96, 101 (2nd Cir. 1996) citing, inter alia, Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979).

CONCLUSION

For the reasons stated above, the Loudoun County Board of Education respectfully requests that, if the Petition for Writ of Certiorari is granted, that this Conditional Cross-Petition also be granted.

Respectfully submitted,

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Counsel for the Loudoun County
Board of Education

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARK HARTMANN, a minor and next friends, Roxana and Joseph Hartmann, et al.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 95-1686-A
LOUDOUN COUNTY BOARD OF EDUCATION, et al.,	)	
Defendant.	)	

ORDER

For the reasons stated in open court, Defendants' Motion to Dismiss is DENIED in part and GRANTED in part, and it is hereby

ORDERED that the Complaint be and is dismissed as to Defendants Edgar B. Hatrick, Jr. and Ned Waterhouse. The Motion is DENIED as to Defendant Loudoun County Board of Education.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 1st day of March, 1996.

/s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MARK HARTMANN, a minor by
his parents and next friends,
Roxanna and Joseph Hartmann,

and

ROXANNA AND JOSEPH HARTMANN,

Plaintiffs,

v. Civil Action
No. 95-1686-A

LOUDOUN COUNTY BOARD OF EDUCATION,

DR. EDGAR B. HATRICK, Superintendent,

and

NED WATERHOUSE, Director of Pupil Services,

Defendants.

MOTION TO DISMISS

COME NOW the defendants, the Loudoun County Board of Education ("Loudoun"), Dr. Edgar B. Hatrick,

Superintendent ("Hatrick") and Ned Waterhouse, Director of Pupil Services ("Waterhouse"), by counsel, pursuant to Federal Rule of Civil Procedure 12(B)(6) and for the reasons more fully set forth in the accompanying Memorandum, respectfully move the Court for dismissal of the Complaint filed by the plaintiffs for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. The Defendants further allege that this case is moot. The defendants ask to be awarded their attorneys fees and costs.

Respectfully submitted,

LOUDOUN COUNTY BOARD OF EDUCATION, DR. EDGAR B. HATRICK and NED WATERHOUSE

By: /s/ Kathleen S. Mehfoud
Counsel

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Counsel for Loudoun County Board of Education,
Dr. Edgar B. Hatrick and Ned Waterhouse

CERTIFICATE

I hereby certify that a true copy of this Motion to Dismiss was sent first-class mail, postage prepaid this 2nd day of February, 1996, to:

Gerard S. Rugel, Esquire
297 Herndon Parkway
Suite 104
Herndon, Virginia 22075

/s/ Kathleen S. Mehfoud
Kathleen S. Mehfoud

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MARK HARTMANN, a minor by
his parents and next friends,
Roxana and Joseph Hartmann,

and

ROXANA AND JOSEPH HARTMANN,

Plaintiffs,

v. Civil Action
No. 95-1686-A

LOUDOUN COUNTY BOARD OF EDUCATION,

Defendant.

ORDER ON FINAL PRETRIAL CONFERENCE

I. STIPULATIONS

1. Mark Hartmann ("Mark") last attended the Loudoun County Public Schools ("Loudoun") on December 21, 1994.

2. Mark was officially dropped from Loudoun's student roles on January 25, 1995.

3. No attempt has been made by Roxanna Hartmann or Joseph Hartmann (the "Hartmanns" or "Parents") to reenroll him in Loudoun since December 1994.

4. Mark has attended the Montgomery County Public Schools ("Montgomery") in Montgomery County, Virginia, since March 1995.

5. Mark receives special education services in Montgomery pursuant to individualized education plans developed for Mark by Montgomery and the Hartmanns.

6. The Hartmanns agree that the services provided to Mark by Montgomery provide Mark with a free appropriate public education.

7. The services provided to Mark in Montgomery have been provided free of charge to the Hartmanns.

8. Mrs. Hartmann has resided in Montgomery County, Virginia, since January 1995 during school months. She resides in Loudoun County during the summer months.

9. Mark has resided with his mother in Montgomery County, Virginia, since January 1995 during school months. He resides in Loudoun County during the summer months.

10. The Hartmanns own a home in Loudoun County, Virginia, in which Mr. Hartmann has continued to reside.

11. Mark and his mother are considered by Montgomery to be residents of Montgomery County for purposes of school attendance.

12. Montgomery receives the funds under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. ("IDEA") for providing special education services to Mark.

13. Montgomery receives the funds under state law for providing an education to Mark.

14. Loudoun requested permission for its experts to observe Mark in his educational program in Montgomery. Montgomery denied the permission even though the Hartmanns had given their consent.

15. Montgomery also refused to allow the Hartmanns' expert, Dr. Schwarz, to observe Mark in their program.

16. Montgomery allowed an evaluator selected by the Hartmanns to observe Mark after permission had been denied to Loudoun and to Dr. Schwarz. This observation is not being offered as evidence by the Hartmanns.

Respectfully submitted,

LOUDOUN COUNTY SCHOOL BOARD

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Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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B. Mark Hartmann is a resident of both Montgomery County and Loudoun County and entitled to a Free Appropriate Public Education in whichever county the Hartmanns choose 7

C. The Hartmann's have sought educational services from Loudoun 8

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No. 97-769

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On Petition For a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

The Cross-Respondents, Mark Hartmann, Roxanna Hartmann and Joseph Hartmann, respectfully request that the Court deny the Conditional Cross-Petition submitted by the Cross-Petitioners in this case.

STATEMENT OF CASE

This Conditional Cross-Petition asserts that the underlying case should have been dismissed for mootness because Mark Hartmann has not been receiving educational services from the cross-petitioner, the Loudoun County School Board (hereinafter referred to as "Loudoun") and has been receiving a free appropriate public education elsewhere.

This contention was previously raised by Loudoun before the state reviewing officer, the federal district court and the Fourth Circuit court of appeals. Each and every time Loudoun has raised this argument it has been rejected.[1]

REASON FOR DENYING THE WRIT

Loudoun has requested that this Court review the Fourth Circuit's legal conclusion that the instant case was not moot. At best, the questions presented involve the "misapplication of a properly stated rule of law". These questions do not present any compelling or novel issues and do not warrant review by this Court.

I. THE FOURTH CIRCUIT CORRECTLY FOUND THAT THE CASE WAS NOT MOOT AS A RESULT OF THE ENROLLMENT OF MARK HARTMANN IN THE MONTGOMERY COUNTY PUBLIC SCHOOL SYSTEM.

The state reviewing officer, the district court and the Fourth Circuit all rejected Loudoun's argument that the instant case was moot. The court of appeals found that

> Loudoun contends that the Hartmanns do not present a valid case of controversy because Mark is currently in an educational placement which the Hartmanns find appropriate. Under the unusual circumstances of this case, this conclusion is not correct. There is no question that the Hartmanns would re-enroll Mark in Loudoun County if their suit is successful. Specifically, the Hartmann's expressed intent to return Mark to school there is corroborated by the fact that Mark's father and sister continue to occupy the family home in Loudoun County.

A-6. This finding correctly applies the legal theory of "mootness".

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[1] *See* Hartmann's Petition for Writ: Opinion of the court of appeals, A-6; Opinion of the district court, A-21-22; Opinion of state reviewing officer, A-42.

A. This case is not moot because the continuing conflict between the Hartmanns and Loudoun renders this action capable of repetition yet evading review.

By their very nature, cases filed pursuant to the Individuals with Disabilities Education Act , 20 U.S.C. §§ 1400 *et. seq.*, (hereinafter "IDEA") can rarely be concluded before the end of a school year, and almost always present the question of whether there continues to be a live controversy. The standard for determining whether a case circumvents the mootness doctrine is well-known: whether "the conduct originally complained of is capable of repetition, yet evading review." In *Honig v. Doe*, 484 U.S. 305, 318 (1988)[2] this Court stated

> Although at present [the student] is not faced with any proposed expulsion or suspension proceedings, **and indeed no longer even resides within the SFUSD [school district]**, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA [now IDEA] therefore are not moot if the conduct he originally complained of is "capable of repetition, yet evading review." (Emphasis added.)

A school district's conduct, challenged under IDEA, is "capable of repetition if there is a reasonable expectation or a demonstrated probability that the same controversy will

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[2] While this Court did declare moot the case of one of the plaintiffs in *Honig*, that plaintiff was no longer entitled to services under the IDEA because of his age (24). That holding has no application to the instant case which involves an eleven year old entitled under the IDEA to educational services.

recur." *Daniel R.R.*, 874 F.2d at 1040.[3] A philosophical breach between a school district and the child provides for finding a continuing controversy. In *Daniel R.R.* the Fifth Circuit ruled that a challenge to a two year old IEP was not moot because there were "irreconcilable views on the issue, whether and to what extent to mainstream Daniel . . ." 874 F.2d at 1041. Daniel's parents sought to have their son educated in the regular education classroom. The school system refused and the parents placed their son in a private school while they pursued administrative and judicial relief. The court stated

> The conduct about which Daniel originally complained is [the school district's] refusal to mainstream him. . . . Each side of this controversy steadfastly adheres to its perception of the [IDEA's] mainstreaming requirement. Given the parties irreconcilable views . . . The parties have a reasonable expectation of confronting this controversy every year that Daniel is eligible for public education.
>
> * * *
>
> Nor does Mr. and Mrs. R's recent decision to remove Daniel from the [school] system render the case moot. Although Daniel no longer attends public school, he remains a citizen of the State of Texas and, thus, remains entitled to a free appropriate public education in the state. Given Daniel's continued eligibility for public educational services under the [IDEA], the mainstreaming controversy remains capable of repetition. See *Honig*, 484 U.S. at ___ ___, 108 S. Ct. at 602-603, 98 L.Ed2d at 703-704.

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[3] See also *DeVries v. Spillane*, 853 F. 2d 264, 268 (4th Cir. 1988), "IDEA cases are classic cases for the application of the 'capable of repetition yet, evading review' rule."

Similarly, the Ninth Circuit has held that a challenge under IDEA is not moot where the school district and the parents "have conflicting educational philosophies and perceptions of the District's mainstreaming obligation." *Sacramento v. Holland*, 14 F.3d 1398, 1403 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2679 (1994). In *Holland*, as in the present case, the school district vehemently opposed the parents' desire to have their child educated in a regular education classroom.

When the parties in an IDEA case hold staunchly opposing views of what is best for a child, the mootness doctrine does not apply because the controversy is capable of repetition yet would evade review under the mootness doctrine. This is true even if the parents remove their child from the school district to ensure the child's educational progress. In *Lee v. Biloxi School District*, 963 F.2d 837, 839 (5th Cir. 1992) the mother of a handicapped child, prompted by a dispute with the school system, sent her daughter to live with her father in another school district. The court stated

> . . . here, [the mother] removed her child from the [school district] and simultaneously sought judicial review from the decisions she believed to be illegal and, more importantly, detrimental to her child's well being and educational best interest. ... As in *Daniel R.R.*, [the mother's] refusal to sacrifice critical years of her daughter's development pending time-consuming review proceedings does not render her case moot.

As both the Fifth and Sixth Circuits have conclusively determined, the parents' "refusal to sacrifice critical years of . . . development pending time-consuming review proceedings does not render [the] case moot. To hold otherwise effectively would insulate [IDEA] claims from judicial review" and it would require parents to submit to educational

placements which they believe "to be illegal and detrimental to their child's well being and educational interests." *Id.*

The case of *Union School District v. Smith*, 15 F.3d 1519, 1524-25 (9th Cir, 1994) presents a strikingly similar fact pattern to the instant case. The Smiths were dissatisfied by the school district's proposed placement. They identified an appropriate private program outside of the school district in which they placed their child. Given the distance between the family home and the school, the student's mother maintained a second residence for the sole purpose of being able to commute daily to the educational program for her son. The family maintained their permanent residence where the father continued to reside and work. The court concluded that under the IDEA (and California law) the child continued to reside within the school district where the educational dispute arose. The court rejected the school district's contention that they were not responsible to provide educational services to the child.

Loudoun's citation of *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982) is easily distinguishable from the instant case. Cross-Petition, p.14.[4] In *Monahan* the plaintiff was the father as next friend for his daughter. His daughter, however, was a married adult over the age 18 who did not reside within the school district. Mark Hartmann, an eleven year old, is both a resident and domiciliary of Loudoun County.

Loudoun's citation of *Dennin v. Connecticut Interscholastic Athletic Conference (CIAC)*, 94 F.3d 96 (2nd Cir. 1996) is equally unpersuasive. CP-15. In *Dennin* a student sought declaratory and injunctive relief so that he could participate on the swim team for the 1995-1996 season. The student obtained the relief sought and was able to compete. CIAC appealed this decision. By the time the case was heard by the court of appeals the swim season had ended.

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[4] Loudoun's Conditional Cross-Petition will hereinafter be designated as "CP" followed by the page number.

Based on the representations of the student that he did not intend to compete the following season, the court of appeals concluded that the case was not capable of repetition and was therefore moot. There is no rational analogy between the facts and holding in *Dennin* and the case presented by Mark Hartmann.

Neither the removal of the child from the school district's educational programs, nor the child's change in residence is sufficient to render IDEA cases moot. Although the Hartmanns chose to avail themselves of a public school as an alternative program rather than a private school, they stand in the same position as any other parents who chooses to remove their child from the public school system during the course of litigation.

A controversy under the IDEA remains "live" so long as the student continues to be entitled to an education under IDEA and the issue can reasonably be expected to be repeated. Whether or not Mark was receiving services from Loudoun is irrelevant. Based on this well established criteria the Fourth Circuit properly found that the instant case presented a live controversy and refused to dismiss the case as moot.

B. Mark Hartmann is a resident of both Montgomery County and Loudoun County and entitled to a Free Appropriate Public Education in whichever county the Hartmanns choose.

Loudoun argues that Mark Hartmann is a resident of Montgomery County not Loudoun County and therefore they are not required to provide him with educational services under the IDEA and state law. While Mark cannot be educated simultaneously in Montgomery County and Loudoun County, under Virginia law he can and does reside in both counties and therefore has a right to be educated in whichever county his parents choose. In *State-Planters Bank v. Commonwealth*, 174 Va. 289, 295 (1940) the Supreme Court of Virginia stated "Domicile and residence are not words of equivalent meaning. One may have a residence at a place without having a domicile

there. A person may have more than one residence, while he can have only one domicile." [5]

Ironically, when Mrs. Hartmann attempted to enroll Mark in the Montgomery County School System the School Board for Montgomery County sought to enjoin Mark from attending. They argued that he was a resident of Loudoun County. The judge refused to issue an injunction finding that Mark was entitled to receive an education in Montgomery County pursuant to Section 22.1-3 of the Virginia Code. The judge stated "Mark and his mother are domiciled in Loudoun County. They are, however, residents of Blacksburg, Montgomery County, as well as Loudoun."[6] Because Mark is both a domiciliary and a resident of Loudoun County his parents may at anytime request that he be enrolled in the Loudoun County Public School System and Loudoun will be required to educate him.

C. The Hartmann's have sought educational services from Loudoun.

Loudoun argues that the Hartmanns have not sought educational services from them since December 1994 and therefore the case is moot. *CP-13.* This argument simply ignores the nature of the ongoing administrative and legal proceedings which have continued since Mark was withdrawn from the Loudoun school system. In filing their civil action the Hartmann's specifically sought a court order which would require Loudoun to provide Mark with educational services in the regular education classroom. At anytime during these proceedings Loudoun could have rendered the case moot by agreeing to provide Mark with the educational services requested by the Hartmanns. They chose not to do so. After

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[5] See also *Aetna Casualty and Surety Co. v. Shambaugh*, 747 F. Supp. 1203 (N.D.W.Va. 1990) holding that under West Virginia law a person may have dual residency, especially in the case of children of divorced parents.

[6] This decision was made part of the record before both the district court and the court of appeals.

being ordered by the district court to provide these services Loudoun again chose the route of litigation over education by appealing to the Fourth Circuit and obtaining a stay of the district court's order pending the appeal.

Given these circumstances it is incontrovertible that the Hartmanns were pursuing education services from Loudoun. That Loudoun has chosen not to provide the educational services requested by the Hartmanns is certainly no grounds for dismissing this case as moot.

D. The Instant Case should not be dismissed on equitable grounds.

The Hartmanns, and similarly situated parents such as those in *Daniel R., Union School District* and *Lee*, are faced with agonizing decisions about the educational needs of their children. In order to provide Mark with a free appropriate public education and demonstrate that a well designed program in the regular public school classroom would work for Mark, the Hartmanns, by necessity, had to enroll their son in a public school outside of Loudoun County. Unlike many parents, the Hartmanns could not have unilaterally placed Mark in a private placement and then sought reimbursement for the tuition.[7] The IDEA's purpose of "maximiz[ing] parental involvement in the education of each handicapped child," *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, at 182 n.6; 102 S. Ct. 3034, 3038; 73 L.Ed. 690 (1982) would be eviscerated if the Hartmann's very concern for the education of their child precluded their ability to seek review of a placement with which they disagree.

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[7] This Court expressly recognized the parents right to pursue its legal rights under IDEA while unilaterally placing their child in a private school because they believed the school district was not providing the child with a free appropriate public education. *Town of Burlington v. Dept. of Education*, 484 U.S. 305; 108 S.Ct. 592, 601; 98 L.Ed.2D 686, 703 (1988); *Carter v. Florence County*, 114 S. Ct. 361 (1993).

CONCLUSION

For the reasons stated above, the Hartmanns respectfully requests that the Conditional Cross-Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 17 1997
CLERK

(3)

No. 97-769

In The Supreme Court of the United States

OCTOBER TERM 1997

LOUDOUN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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12 pp

QUESTIONS PRESENTED

1. Whether a school district has an obligation under IDEA to offer educational services to a disabled student once the student moves to another jurisdiction and receives a free appropriate public education there.

2. Whether a student's move to another jurisdiction moots the issue of the appropriateness of the student's IEP which was proposed prior to his relocation.

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No. 97-769

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

LOUDOUN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

MARK HARTMANN, a minor by his parents and next friends, Roxanna and Joseph Hartmann, and ROXANNA AND JOSEPH HARTMANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

For reasons stated in the opening brief and in the following reply brief, the Conditional Cross-Petition submitted by the Loudoun County Board of Education

("Loudoun") should be granted in the event this Court grants the petition submitted by Mark Hartmann, Roxanna Hartmann and Joseph Hartmann ("the Hartmanns").

I. THIS CASE IS MOOT DUE TO MARK'S MOVE TO MONTGOMERY COUNTY

The Hartmanns argue that this case is capable of repetition yet evading review in order to avoid the application of the mootness doctrine. This assertion is erroneous because it overlooks the fact that in contention is the review of an expired 1994-95 individualized educational plan ("IEP"). The Hartmanns have not sought the development of subsequent IEPs by Loudoun and instead have had IEPs developed by Montgomery County. There is no evidence in the record that Loudoun would automatically offer Mark Hartmann the same education program as previously if he were to re-enroll in the Loudoun County Public Schools today. Because the parents have not requested services since December 1994, there is no current pending placement for this Court to review.

The argument is also erroneous because it ignores the fact that for the past two and one-half years, Mark has received the free appropriate public education which the Hartmanns desired for Mark. Thus, the Hartmanns have not had any dispute over Mark's educational services since December 1994. These facts make this case moot and not worthy of this Court's consideration.

A. ESTABLISHMENT OF RESIDENCE IN ANOTHER SCHOOL DISTRICT MOOTS ANY REVIEW OF THE APPROPRIATENESS OF THE EDUCATION IN LOUDOUN.

The Hartmanns argue that the case is moot because the conduct originally complained of is capable of repetition yet evading review. See Cross-Respondents' Brief pp. 2-7, citing Honig v. Doe, 484 U.S. 305, 318 (1988). While this statement of law is correct, it is not appropriately cited in the instant case. Mark Hartmann last attended the Loudoun County Public Schools in December, 1994. The last IEP developed for him by Loudoun County was developed in May 1994. Since that time, the Hartmanns have sought no educational services from Loudoun for Mark. Because no services have been requested from Loudoun in the intervening years due to Mark's residency and receipt of an appropriate education in Montgomery County, Virginia, Loudoun has not been requested to develop any subsequent IEPs for Mark.

The Hartmanns whole argument on mootness presupposes that Loudoun would automatically re-offer Mark a placement in an autistic program rather than considering him for inclusive services if he were to re-enroll. This supposition is not based on any facts in the record and certainly does not present a continuing live controversy. It cannot be assumed that because Loudoun offered placement in an autism program in the 1994-95 school year, that for the 1997-98 school year, it would offer an identical placement to Mark. The IDEA requires that IEPs be developed and reviewed annually. 20 U.S.C.

§ 1414(a)(4). It would be contrary to this dictate to assume that an identical IEP would be offered to Mark Hartmann three and a half years after the development of the May 1994 IEP and without regard to any changes in Mark's educational needs that would require modifications to his educational programming.

The Hartmanns attempt to classify this case as a dispute over "philosophical differences." They argue that this philosophical disagreement establishes this case as a continuing controversy. This argument is without foundation. There is no philosophical difference between Loudoun and the Hartmanns regarding inclusion. It was noted in the record that Loudoun had some model inclusion programs within its school division. Loudoun's experts testified that Mark would be reintegrated into regular classes just as soon as his behaviors improved. Thus, there are no continuing philosophical differences between Loudoun and the Hartmanns. Mark's placement and the amount of regular education instruction he received will be determined each year based on his educational needs during the year.

The cases cited by the Hartmanns in their brief do not support finding that this case is a continuing controversy. The Hartmanns cite Honig v. Doe, supra. In that case, the mootness doctrine was avoided even though the student had moved from the jurisdiction of the local school district because the student was contesting the application of a state-wide statute governing discipline of students with disabilities. There is no such contention of a state-wide application of a policy in this case that will affect Mark whether he is enrolled in Montgomery or in Loudoun

County. The Hartmanns also cite Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). In that case, however, a conclusion was also made that there could be a continuing controversy capable of repetition in another school division. In the instant case, however, Mark's situation was not capable of repetition because for three and a half years he has received inclusion services in Montgomery County. Thus, whatever controversy existed in this case ended when Mark began receiving the services his parents desired upon their move to Montgomery County.

Similarly, the parents references to Sacramento v. Holland, 14 F.3d 1398 (9th Cir. 1994) cert. denied, 114 S. Ct. 2679 (1994), Lee v. Biloxi School District, 963 F.2d 837, 839 (5th Cir. 1992) and the other cited cases do not further their claim that this case is capable of repetition yet evading review. The Hartmanns have cited no cases which hold that there can be an ongoing controversy where there has been a change in residence followed by receipt of the exact services which the parents are seeking in the new public school program. In other words, the very fact that Mrs. Hartmann relocated to Montgomery County, Virginia, where it is conceded that Mark has been receiving a free appropriate public education now for three and a half years, moots this case. There is no controversy over the education services that Mark has received since the relocation to Montgomery County. Thus, the Hartmanns' continuing effort to seek review of a May, 1994 IEP years after the fact when Mark admittedly received appropriate services free of charge in the intervening years makes this case

moot. None of the cases cited by the Hartmanns address these factual situations.

B. MARK HARTMANN IS NOT A RESIDENT OF BOTH MONTGOMERY COUNTY AND LOUDOUN COUNTY.

The Hartmanns concede that Mark cannot be educated simultaneously in Montgomery County and Loudoun County. Nonetheless, they contend that Mark can receive services under the IDEA both from Loudoun and from Montgomery Counties. The fact remains that Mark cannot receive services simultaneously from both places and has not sought services from Loudoun since December, 1994. As noted in Loudoun's opening brief, a student is only entitled to receive one free appropriate public education under the IDEA. Thus, while Mark is enrolled in Montgomery County Public Schools as a resident of Montgomery County, he is not entitled to services from Loudoun.

C. THE HARTMANNS HAVE NOT SOUGHT EDUCATIONAL SERVICES FROM LOUDOUN.

The Hartmanns argue in their brief in opposition that they are seeking services from Loudoun. See Brief in Opposition pp. 8-9. This argument overlooks the fact that they have not sought to re-enroll Mark since December, 1994 in the Loudoun County Public Schools, and that

during that entire period, they have enrolled him in the Montgomery County Public Schools. The Hartmanns have not asked Loudoun to provide educational services to Mark since December, 1994. Instead they have elected to receive those services from Montgomery County. Thus, it is erroneous to assert that the Hartmanns have continued to seek educational services from Loudoun.

D. THE HARTMANNS HAVE NOT PRESENTED EQUITABLE GROUNDS TO AVOID APPLICATION OF THE MOOTNESS DOCTRINE.

The Hartmanns have argued that they should not be penalized for relocating Mark to Montgomery County, Virginia and enrolling him in the public school program there. This argument does not present equitable considerations because the Hartmanns are no different from other parents who relocate from one school division to another because they prefer the educational services available in the other locality. Parents relocate every day for this very reason. There is no equitable argument, however, where Mark has received what the parents admit to be a free appropriate public education since this relocation. They have received all that they are entitled to under the IDEA.

CONCLUSION

For the reasons stated above and in its opening brief, the Loudoun County Board of Education respectfully requests that the Conditional Cross-Petition for Writ of Certiorari be granted.

Respectfully submitted,

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